

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

FC 2006-005253

09/13/2007

HONORABLE ROBERT BUDOFF

CLERK OF THE COURT

L. Carlson

Deputy

IN RE THE MARRIAGE OF  
EMILY MARIE FRANCO

SANDRA J FROMM

AND

RICHARD DUEY FRANCO

MARIUS P ESCOLAR

ARIS J GALLIOS  
LARRY WALDMAN  
7200 W BELL RD #G-101  
GLENDALE AZ 85308

**RULING**

This matter was taken under advisement after Evidentiary Hearing on September 6, 2007, and the Court has now considered the testimony presented, the exhibits in evidence and the arguments of counsel and finds as follows:

1. The parties' marriage was dissolved by Decree of April 11, 2007.
2. The parties are the parents of two minor children, Anthony, born October 17, 1993, and Tiffany, born August 21, 1997.

The Decree provided that the parties would share joint legal custody of the children and contained a parenting time schedule which provided that Mother would be the primary residential parent and that Father would have regularly scheduled parenting time with the children including alternating weekends, one evening

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per week (not overnight) during the school year and additional overnights during the week during the summer. The parties also agreed to divide holidays and to allow each of them up to two nonconsecutive weeks of vacation with the children each summer.

3. The Joint Custody Agreement and Parenting Plan that was eventually adopted by the Court was initially prepared by counsel and discussed at length in open Court with the parties with some changes being made after discussion. The parties, at the time of the entry of the Joint Custody Agreement, both indicated their willingness to follow the terms thereof and the belief that the agreement was in the children's best interest. They agreed to joint legal custody even though they had continued substantive conflict over the terms of the agreement.
4. At the time of the Hearing when the agreement was adopted a dispute immediately arose relative to a weekend activity of Anthony's that would prevent Father from exercising parenting time on the April 13, 2007 weekend with Anthony and the parties agreed, and the Court ordered, that Father would be entitled to make-up time for the initial lost weekend. With regard to this issue Mother believes that Father indicated to her that he was not intending to make up the time but Father in his testimony stated otherwise. The April 13 missed day was never "made up".
5. On May 30, 2007, Mother filed a Petition for Enforcement of the Consent Decree based upon her allegation that Father did not return the children to her on time after his Memorial Weekend visit. Father filed a Response to the Petition to Enforce and a Counter-Petition for Contempt on June 8, 2007, alleging failure of Mother to allow him his make-up time. Mother believes that the children were to be returned to her by 6:00 p.m. on Sunday, May 27, 2007, and Father believed that he could keep the children until 6:00 p.m. on Monday, May 28, 2007 (to exercise his "make-up time").

The parties argued by e-mail and by phone over when the children should be returned and Mother eventually called the police and had the police intercede and the children were returned to Mother late in the evening of May 27, 2007, certainly well after 6:00 p.m.

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At the time of this incident the children were in Heber, Arizona with Father where Father's extended family resides.

6. On June 13, 2007, the parties appeared before this Court for a Return Hearing on the Petitions for Enforcement and Counter-Petition for Contempt and after discussion it became clear to the Court that these parties were clearly unable to communicate and cooperate with each other in the children's best interest for joint legal custody to be appropriate.

Mother filed a Petition to Modify Custody asking that she be awarded sole custody on June 22, 2007. Father filed his Response on July 16, 2007 (asking that joint custody be maintained) and also filed his own Petition for Enforcement of the Decree and a Request for Sanctions based upon his allegation that Mother did not allow him make-up time (from April 13), had prevented him on another occasion (July 11, 2007) from visiting with Anthony (as allegedly Anthony told Mother and his grandfather that he did not want to visit with Father that day), Mother's unresponsiveness with the Parenting Coordinator process with Dr. Larry Waldman, and the negative influence that Mother is imposing on the children relative to Father's religion.

7. Extensive testimony was presented at the September 6, 2007, hearing from the parties and others relative to the parties' communication and cooperation with each other, the circumstances surrounding the incidences of April 13, May 27 and July 11, 2007, and the matter of the children's religious upbringing, and from the testimony presented the following findings are made:
  - a. Father has been aggressive, abusive and intimidating to Mother in phone conversations, e-mails and in conference with the Parenting Coordinator.
  - b. Father has been rude and intimidating to Tiffany's dance director, Frances Campbell, and to dance teacher, Taani Farnsworth.

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- c. Father is controlling and dictatorial with Mother over parenting schedule issues as he does not discuss issues with her and merely dictates to her as to how issues should be resolved immediately after she refuses to accede to his wishes. This has been exhibited relative to parent/child exchanges, schedule changes, and by taking the children to counseling without so advising Mother.
- d. Father discusses the custody case with the children and advises them that the case is Mother's fault and that because of her behavior it is costing him significant sums of money to litigate.
- e. Father failed to disclose to Mother the fact that he had a car accident with the children in the car. It is determined that the mere fact that Father had a minor accident is not so important, but Father, in the children's presence, advised the police officer that he was wearing his seat belt when the children had observed that he was not. (He lied to an officer in the children's presence and the children knew it.)
- f. Father has failed to participate on a regular basis (the Court finds that his attendance has been minimal in reality) in Tiffany's dance activities which is an activity in which she is highly committed and highly talented.
- g. Father has failed to return the children on time from his parenting time periods. He has, on a regular basis, been 15 to 30 minutes to 1 hour late which the Court considers to be an example of passive-aggressive behavior towards Mother which adds to the parties' inability to trust each other and to work together with regard to co-parenting.
- h. Notwithstanding that the Decree provides that the children would be raised in the Catholic faith and only attend the Mormon church if they desired to do so, it is clear that Father has intimidated and coerced the children to attend Mormon church services when they are in his care

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Although Father has agreed that the children be raised in the Catholic religion and the children appear to be committed to this religion, Father apparently believes that regardless of the children's wishes he should be able to take the children to his church and expose them to his religion when they are in his care. Parenting Coordinator, Dr. Waldman, believes that this is not generally in the children's best interest.

(He opined in Exhibit 44 in evidence that children should not be forced to choose between religions and must be directed towards one, and only one religion, during their childhood).

- i. Mother did preclude Father from exercising parenting time with Anthony on April 13 (with his agreement that he would get make-up time) and July 11, 2007, and Father is entitled to make-up time for those missed visits. Mother's rationale on July 11 that Anthony did not want to visit with Father on that day is not a basis for the parenting time to not have occurred. Children do not choose the parenting time, the Court order or the parents do.
- j. Mother is unable to communicate with Father on a level playing field. The history of the nature of the parties' relationship is that Father is the controlling force, that Mother was and remains unable to defend her own positions in discussions with Father and that when Father begins to dictate direction to her, she now refuses to further communicate with him. She has taken this course because she is attempting to avoid verbal and emotional abuse from Father.
- k. The children's Best Interest Attorney reports that the children have a good relationship with and enjoy their time with both parents except for those times when Father forces them to go to the Mormon church. There is also a sense on Tiffany's part that Father is not supportive of her dance activities which makes her very unhappy.

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- l. The children have positive relationships with both extended families (although the families seem to be in conflict with each other) and the children remain relatively well-adjusted in their school and extra-curricular activities.
- m. During the high percentage of Father's parenting time period he takes the children to the Heber area where his mother and his extended family reside, which is not necessarily bad for the children, and there is no reason that this cannot continue.
- n. No basis has been shown to the Court that the parenting time schedule itself should be changed.
- o. Father was precluded from exercising parenting time on April 13 and July 11, 2007, with Anthony. Father is therefore entitled to make-up time for two 24-hour periods (the Court acknowledges that the July 11, 2007, loss of parenting time was not for the entire day). Father shall give notification in writing to Mother by e-mail of the make-up days that he wishes to exercise. These days shall be exercised between October 15 and December 15, 2007. Before designating his make-up time days Father shall discuss the matter with Anthony so that Father's choice of make-up days does not interfere with Anthony's otherwise scheduled activities.

Based upon the foregoing and having considered the relevant factors of A.R.S. 25-403 and 25-403.01, the Court finds that continuation of joint legal custody for the parents is not in the children's best interest for the following specific reasons:

- 1. The parties are continually unable to communicate with each other in a civil manner relative to the best interest of the children.
- 2. They have been unable to negotiate necessary changes in parenting time schedules without substantial conflict.

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3. Both parents have been unable to have or to feel free to have open discussions with each other relative to children's issues as Father is dictatorial and Mother is passive.
4. Both parents have been unable to refrain from making negative remarks about the other parent in the children's presence when frustrated or angry with the other.

IT IS ORDERED terminating joint legal custody.

IT IS FURTHER ORDERED awarding Mother sole legal custody of the children with full final decision-making authority relative to all educational, medical and religious issues.

The Court chooses Mother as the sole legal custodian of the children having considered all of the findings previously made herein and the most substantial factor that Mother has been and continues to be the children's primary caregiver. She is most available to the children based upon her work schedule and residence location, she is most committed and able to take Tiffany to her dance activities which are of major importance to Tiffany and clearly in her best interest and most supportive of the children's Catholic upbringing to which the parties previously agreed and which they affirmed in open Court during the September 6, 2007, hearing.

IT IS FURTHER ORDERED that there be no change to the parenting time schedule that is currently in effect.

IT IS FURTHER ORDERED in accordance with the recommendations of Parenting Coordinator, Dr. Larry Waldman, and to avoid further confusion and conflict in the children's lives, that their only religious training shall be in the Catholic faith and that they not be taken to an LDS church or LDS church training. In making this decision relative to the religious issue, a decision that this Court has, in the past, avoided when at all possible, the Court determines that the conflict between the parents over this issue and the need for the children to have consistency in this area requires that such an order be entered in their best interest.

**ATTORNEY'S FEES**

Each party has requested an award of attorney's fees alleging the unreasonableness of the other during these proceedings and the fact that the other has caused the litigation to expand and continue. Each party shall file a specific, separate Application for Attorney's Fees and an attached China Doll Affidavit for this Court's consideration by October 1, 2007. The Court will rule on the Attorney's Fees issue thereafter without hearing unless one is determined to be necessary after review of the pleadings.

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**PARENTING COORDINATOR**

The Court finds that the continuation of Dr. Larry Waldman as Parenting Coordinator is in the children's best interest even though the status of joint legal custody has been terminated. The Court believes that Dr. Waldman's services can be best utilized to help these parties resolve future disputes over parenting time issues without further Court intervention.

/ s / HONORABLE ROBERT BUDOFF

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JUDICIAL OFFICER OF THE SUPERIOR COURT